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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/081,788	02/22/2002	Robert Petermann	88265-6778	2714
29157	7590	03/22/2005	EXAMINER	
BELL, BOYD & LLOYD LLC			HENDRICKS, KEITH D	
P. O. BOX 1135			ART UNIT	PAPER NUMBER
CHICAGO, IL 60690-1135			1761	

DATE MAILED: 03/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/081,788	Applicant(s) PETERMANN ET AL.	
	Examiner Keith Hendricks	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 February 2005.
 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
 4a) Of the above claim(s) 12-20 is/are withdrawn from consideration.
 5) ☐ Claim(s) _____ is/are allowed.
 6) ☒ Claim(s) 1-11 is/are rejected.
 7) ☒ Claim(s) 3 is/are objected to.
 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☒ None of:
 1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
 * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>2-22-02</u> | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Election/Restrictions

Applicant's election without traverse of Group I, claims 1-11 in the reply filed on February 18, 2005, is acknowledged. Claims 12-20 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention.

Claim Objections

Claim 3 is objected to because of the following informalities: it is grammatically incorrect and confusing ("there are two distinct adjoining masses with a median surface is formed"). Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 8 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The phrase "preferably" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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i) Claims 1-2 and 5-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Roche et al. (US PAT 6,063,419).

Roche et al. disclose a flavored yogurt product, where the flavoring is applied by a spray nozzle to equi-spaced locations around the sidewall of a container (pot). The yogurt is then added to the container, whereby a ripple pattern of the flavoring within the yogurt, is established. The mass is cooled, thus providing a stable product.

ii) Claims 1-5, 7-8 and 10-11 are rejected under 35 U.S.C. 102(e) as being anticipated by Daravingas et al. (US PAT 6,235,320).

Daravingas et al. disclose a "colored multi-layered yogurt", "having a plurality of layers, portions or regions, each having a discrete color" (abstract/title).

The layers are in direct physical contact and do not have an intermediate barrier. The yogurt layers are relatively high in viscosity (15,000 to 30,000 cps) and the difference in viscosity between portions is less than about 3,000 cps. Those yogurt layers having a color essentially contain selected non-bleeding colorants and, optionally, naturally colored ingredients such as fruit puree. Bleeding/migration of colorants between layers and mixing upon handling is minimized by selecting viscosity and colorants.

According to columns 9-10, the additional layers may be either a yogurt, or "the second layer can be compositionally different (col. 10, ln. 59-60). Column 11 refers to the various patterns and styles of colored multi-layered yogurts that can be produced. Stabilizers are used in amounts of from 0.1 to 3% of the yogurt (mid-col. 4), preferably in amounts totaling "about 1.6% to about 3.8%" (mid col. 6). At the bottom of column 5, it is stated that

The finished yogurt can vary in known manner in fat content and the yogurt base can optionally include specific formulations so as to provide nonfat (i.e., less than 0.5% butterfat), low fat (i.e., about 1.5% fat), reduced fat (about 2% fat), or full fat (about 3.5% fat) yogurts. The yogurt base can thus include such dairy ingredients such as whole milk, partially skimmed milk, skim milk, nonfat dry milk and the like. The yogurt base, before the addition of bulky flavors and/or sweeteners, contains about 0.1% to 4% milkfat and not less than 12% milk-solids-not-fat ("MSNF").

Cream may also be utilized (top col. 6). Sweeteners may be used in amounts of between 8% and 14% (bottom col. 7), and "can additionally comprise about 0.1% to 25% of the product of fruit preserves dispersed throughout the yogurt phase" (col. 9). The reference also discloses that the yogurt product may or may not be deaerated, where "certain highly preferred method embodiments herein do not require deaeration." Further, the yogurt "can additionally comprise about 0.1% to 25% of the product of fruit preserves dispersed throughout the yogurt phase" (col. 9).

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iii) Claims 1-5 are rejected under 35 U.S.C. 102(b) as being anticipated by Naoki et al. (JP 64-16553).

Naoki et al. disclose a multicolor-patterned yogurt, comprising stabilizers and wherein the resultant yogurt has a viscosity of greater than 1,000 cP. Once the yogurt materials are made, "two or more kinds of the yoghurts are then simultaneously filled in a container to form a multicolor pattern" (abstract). See especially the figures at page 306, which demonstrate patterns of both spiral shaped design, and those in a "Neapolitan style." The chart at the top of page 306 demonstrates viscosities up to 4,000 cP (fourth column from the right). The yogurts of different color are produced in the same manner (abstract), except for the added color, and therefore would be expected to possess approximately the same viscosity.

iv) Claims 1-2 and 5-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Warendorf (EP 0 853 888).

Warendorf discloses a dessert product comprising a milk-based component and an embedded fruit-based component which provides flavor and color, such as fruit puree, fruit granules or fruit juice. The milk-based component is made from a fermented milk, such as cheese, curd or yogurt, and may be in the form of a mousse, pudding, etc. (pg. 2, ln. 53-56). The product has been whipped to an overrun "in the area of 100%." Either or both of the phases (milk and/or fruit) may contain thickeners such as polysaccharides. Example 2 provides a fermented yogurt which is whipped to an overrun of 80%. See also the fruit phase as element 21 in Figure 3, as well as Figure 4 and the description at page 4, which demonstrates the production of fruit phase stripes throughout the milk-based component.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Daravingas et al., in view of Warendorf (EP 0 853 888).

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Daravingas et al. and Warendorf are taken as cited above.

It would have been obvious to one of ordinary skill in the art to have utilized the yogurt product of Daravingas et al. as the milk-based component within the whipped dessert of Warendorf. Warendorf does not provide a specific recipe for producing the milk-based component, such as a yogurt, but does provide specific teachings regarding its use and regarding the manufacturing of the dessert product. Thus, one of ordinary skill in the art would have easily turned to the art to find a recipe for preparing a yogurt or similar fermented milk product, and would have been amply motivated to use the teachings of Daravingas et al., with regard to the yogurt product therein. Daravingas et al. provide a similarly-patterned dessert-type product, and thus it would not have involved an inventive step for the ordinarily-skilled artisan to have utilized these teachings to arrive at the instantly-claimed invention. The production of aerated yogurt products and other dairy-based products was well known in the art*, as demonstrated by Warendorf, including the production of multicolor patterned aerated products.

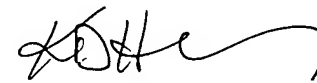
* See also Okonogi et al. (US 4,717,571), Beyer et al. (US 5,494,692), FR 2 702 470, and JP 11-151069, of record, regarding the production of aerated yogurt products and other dairy-based products in the art.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



KEITH HENDRICKS
PRIMARY EXAMINER